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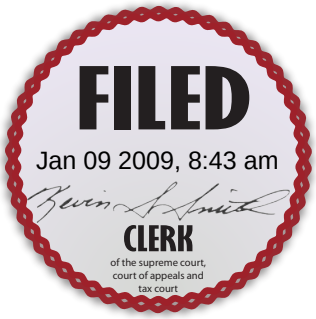

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IN THE
COURT OF APPEALS OF INDIANA

JENNIFER KATHY MICKEL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 53A05-0804-CR-248
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MONROE CIRCUIT COURT
The Honorable Kenneth G. Todd, Judge
Cause No. 53C03-0706-CM-2740

January 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Jennifer Kathy Mickel appeals her conviction for resisting law enforcement as a class A misdemeanor.[1] Mickel raises two issues, which we revise and restate as:

I. Whether the evidence is sufficient to sustain her conviction; and

II. Whether the trial court abused its discretion when it refused to give two jury instructions proposed by her.

We affirm.

The relevant facts follow. On June 25, 2007, Jay Buchanan-Carter called the police because he had been bitten in the leg by a dog near a coffee shop in Bloomington.[2] When Bloomington Police Department Officers Donald Pence and Randy Gehlhausen arrived to investigate the call, they found Buchanan-Carter and Matthew O'Neill, the owner of the coffee shop, waiting for them with two dogs tied to a tree nearby. Officer Pence interviewed Buchanan-Carter and O'Neill and took pictures of Buchanan-Carter's wounds while Officer Gehlhausen searched for Mickel, the owner of the dogs. Officer Gehlhausen found Mickel inside the coffee shop, informed her that one of her dogs had just bitten someone, and asked her to come outside. Mickel responded that her dogs "don't bite" but nevertheless accompanied Officer Gehlhausen. Transcript at 191.

[1] Ind. Code § 35-44-3-3 (Supp. 2006).

[2] Mickel argues that the State's emphasis in its brief on the alleged dog bite "is improper in light of the trial court's order that whether a bite actually occurred is irrelevant for purposes of whether Mickel resisted law enforcement." Reply Brief at 3. Although the trial court granted Mickel's motion in limine prohibiting the State from asking any witness concerning whether a dog bite occurred, see Appellant's Appendix at 9, numerous witnesses discussed the dog bite at trial, and Mickel failed to object to their testimony. See Transcript at 126, 146, 163, 189. Thus, Mickel has waived any argument concerning the admissibility of the dog bite. See Lewis v. State, 755 N.E.2d 1116, 1122 (Ind. Ct. App. 2001) ("Failure to make a contemporaneous objection to the admission of evidence at trial results in waiver of the error upon appeal.").

Once outside, Officer Pence asked Mickel if she had proof of immunization for the dogs. Mickel answered that she did not, and the officers informed her that they would have to contact Animal Control to quarantine the dogs until they could be proven healthy. Mickel became angry and shouted, "[Y]ou're not going to take [my] dogs to those murderous people . . . ." Id. at 128. As she began to untie her dogs from the tree, the officers instructed her not to do so because one of them had already bitten someone. Mickel untied them anyway and led them past the officers toward her van. The officers raised their voices ordering her to stop and informing her that they would place her under arrest if she failed to comply, but she responded that her "dogs wouldn't bite anybody" and placed them in the van. Id. at 129.

Officer Pence then attempted to handcuff Mickel. Mickel pulled away and began flailing and twisting her arms to prevent her hands from being placed behind her back. She then shoved Officer Pence. Officer Gehlhausen attempted to grab her and do a "take down maneuver," and the three of them fell into a grassy area near the van, where the officers struggled to place her in handcuffs. Id. at 197. Once on the ground, Mickel "buried her hands underneath her." When Officer Gehlhausen attempted to pry her arm free, she bit him on the forearm. At some point, she also kicked him in the chest and groin.

The State charged Mickel with resisting law enforcement as a class A misdemeanor. After a trial, the jury found her guilty as charged, and the trial court sentenced her to 10 days in jail.

The issue is whether the evidence is sufficient to sustain Mickel's conviction. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

Indiana Code § 35-44-3-3(a)(1) provides that "[a] person who knowingly or intentionally . . . forcibly resists, obstructs, or interferes with a law enforcement officer or a person assisting the officer while the officer is lawfully engaged in the execution of the officer's duties . . . commits resisting law enforcement, a Class A misdemeanor . . . ." Thus, to convict Mickel of resisting law enforcement as a class A misdemeanor, the State needed to prove that Mickel knowingly or intentionally forcibly resisted, obstructed, or interfered with Officers Pence and Gehlhausen while the officers were lawfully engaged in the execution of their duties.

Mickel argues that the officers did not have probable cause to arrest her, that the arrest constituted an illegal seizure of her person in violation of the Fourth Amendment, and that, therefore, the officers were not lawfully engaged in the execution of their duties.

The Fourth Amendment requires that an arrest or detention for more than a short period be justified by probable cause. Overstreet v. State, 724 N.E.2d 661, 663 (Ind. Ct. App. 2000) (citing Woods v. State, 547 N.E.2d 772, 778 (Ind. 1989)), reh'g denied, trans. denied. However, the Indiana Supreme Court has clarified that, even if an arrest was invalid, resisting is still an independent offense. Row v. Holt, 864 N.E.2d 1011, 1017 (Ind. 2007) (citing Shoultz v. State, 735 N.E.2d 818, 823 (Ind. Ct. App. 2000)). The general rule in Indiana is that "a private citizen may not use force in resisting a peaceful arrest by an individual who he knows, or has reason to know, is a police officer performing his duties regardless of whether the arrest in question is lawful or unlawful." Row, 864 N.E.2d at 1017; Shoultz, 735 N.E.2d at 823. Thus, under that rule it is immaterial whether Mickel's purported arrest for resisting law enforcement was supported by probable cause. Shoultz, 735 N.E.2d at 823.

In so holding, we acknowledge our holding in Briggs v. State, 873 N.E.2d 129, 133-134 (Ind. Ct. App. 2007), reh'g denied, trans. denied, that, where an arrest was made in violation of the Fourth Amendment, the arresting officers were not lawfully engaged in the execution of their duties and reversal of defendant's conviction for resisting law enforcement was proper for lack of sufficient evidence. However, Briggs involved an intrusion by the officers into a defendant's dwelling, where the officers then detained the defendant "based solely on a hunch that he could have a weapon in his bedroom." Id. at 133. Furthermore, we are constrained by the Indiana Supreme Court's discussion in Row

as well as our reasoning in Dora v. State, 783 N.E.2d 322, 327 (Ind. Ct. App. 2003), trans. denied, that, despite the "lawfully engaged" requirement in Ind. Code § 35-44-3-3,

> [The statute] does not give the individual the prerogative to resist an arrest for which he believes there is insufficient probable cause or is otherwise unlawful. When there is a dispute as to the validity of an arrest, that question is "'more properly determined by courts than by the participants in what may be a highly emotional situation.'" Fields[v. State, 178 Ind.App. 350, 356, 382 N.E.2d 972, 976 (1978)] (quoting Miller v. State, 462 P.2d 421, 426-27 (Alaska 1969)). To adopt Dora's position, allowing a citizen to resist what he believes at that time to be an unlawful arrest, would effectively encourage rather than inhibit violence during arrests. This we cannot condone.

Accordingly, we must reject Mickel's argument.

Mickel also argues that she did not forcibly resist the officers. A person forcibly resists "'when strong, powerful, violent means are used to evade a law enforcement official's rightful exercise of his or her duties.'" Guthrie v. State, 720 N.E.2d 7, 9 (Ind. Ct. App. 1999) (quoting Spangler v. State, 607 N.E.2d 720, 723 (Ind. 1993)), trans. denied. Mere passive resistance is not sufficient to sustain a conviction for resisting law enforcement. Id.

In support of her argument, Mickel cites out of context the testimony of certain witnesses. For example, she quotes Officer Pence's testimony that her resistance was "passive." Transcript at 180. However, Officer Pence's testimony was that she passively resisted by pulling away from him when he *first* attempted to place her in handcuffs:

> Q: Is, is it true that all she really did was pull her arms away from you so that you could not handcuff her arms?
>
> A: *Initially*.

Q: Okay. And in fact would you describe what she was doing as passive resistance?

A: Yeah, passive, not aggressive, but passive, just like you're pulling away from us.

Id. at 180-181 (emphasis added). Officer Pence did not characterize Mickel's resistance throughout the encounter as merely passive.[3] Moreover, Officer Gehlhausen testified that she bit him on the forearm and kicked him in the chest and groin and shoved Officer Pence. Buchanan-Carter testified that Mickel "went berserk," was flailing and twisting around and "just trying to do everything that she could not to let the officers put her hands behind her back." Id. at 128, 130. To the extent that testimony cited by Mickel suggests that she merely passively resisted the officers throughout the encounter, we conclude that Mickel is asking that we reweigh the evidence, which we cannot do.

Given the facts of the case, we conclude that the State presented evidence of probative value from which a reasonable trier of fact could have found Mickel guilty beyond a reasonable doubt of resisting law enforcement as a class A misdemeanor. See, e.g., Johnson v. State, 833 N.E.2d 516, 518-519 (Ind. Ct. App. 2005) (holding that defendant forcibly resisted police officers by turning away and pushing away with his shoulders as they attempted to search him, refusing to get into the transport vehicle, and stiffening up, thus requiring the officers to exert force to place him inside the transport vehicle).

[3] The rest of Officer Pence's testimony on direct examination is missing from the record, which contains the following notice: "Due to unknown technical malfunction the recording of the trial stops at

II.

The next issue is whether the trial court abused its discretion when it refused to give two jury instructions proposed by Mickel. "Instruction of the jury is within the discretion of the trial court and is reviewed only for an abuse of discretion." Washington v. State, 840 N.E.2d 873, 888 (Ind. Ct. App. 2006), trans. denied. When reviewing the propriety of the trial court's decision to refuse a tendered jury instruction, we consider the following factors: (1) whether the instruction was supported by evidence in the record; (2) whether the instruction correctly states the law; and (3) whether other instructions adequately cover the substance of the denied instruction. Id. "A defendant is only entitled to a reversal if he affirmatively demonstrates that the instructional error prejudiced his substantial rights." Id.

The trial court rejected the following proposed jury instruction tendered by Mickel:

DEFENDANT'S TENDERED FINAL JURY INSTRUCTION NO. 1

> The law does not allow a peace officer to use more force than necessary to effectuate an arrest and if he does use such unnecessary force an arrestee may resist the arrester's use of *excessive force* by the use of reasonable force to protect him or herself against *great bodily harm*.
>
> If you find that Officers Gehlhausen and Pence used more force than necessary to effectuate the arrest and Jennifer Mickel resisted the arrest to such an extent as necessary to protect herself from *great bodily harm*, then you must find her not guilty of resisting law enforcement.

2:49 p.m. and resumes at 3:07 p.m." Transcript at 172.

Appellant's Appendix at 10 (emphasis added and footnote omitted). Mickel argues that this instruction is an accurate statement of the law and is applicable in the present case because Officer Gehlhausen was "like a football player trying to tackle [her] and get [her] down." Appellant's Brief at 21.

Claims that law enforcement officers have used excessive force in the course of an arrest of a free citizen are analyzed under the Fourth Amendment to the United States Constitution and its "reasonableness" standard. Shoultz, 735 N.E.2d at 823-824 (citing Graham v. Connor, 490 U.S. 386, 395, 109 S. Ct. 1865, 1871 (1989)). Because the Fourth Amendment test of reasonableness is not capable of precise definition or mechanical application, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Id. at 824 (citing Graham, 490 U.S. at 396, 109 S. Ct. at 1872). The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. Id. However, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Id.

In Shoultz, we held that the officer used excessive force on the defendant where the officer sprayed the defendant, who had been yelling at the officer, with pepper spray,

and struck the defendant in the back of the legs and over the head with a metal flashlight that was "fifteen to eighteen inches long and bigger around than a billy club." Id. at 822. While the defendant was lying on the ground bleeding profusely from his head, the officer placed handcuffs on him. He then began to thrash about on the ground and kicked the officer in the shin. Applying the factors announced in Graham, we reversed the defendant's conviction for resisting law enforcement as a class A misdemeanor, reasoning that the defendant's resistance to being arrested while bleeding profusely from a head wound was privileged in light of the officer's use of excessive force. Id. at 825.

In the present case, however, we agree with the State that there was no evidence that the officers used excessive force against Mickel. They did not strike her as in Shoultz. Rather, they struggled to place her in handcuffs, and, when she began flailing and shoved Officer Pence, Officer Gehlhausen performed a "take down maneuver," and the three of them fell into a grassy area, where the officers succeeded in handcuffing her. Transcript at 197. Furthermore, there was no evidence that Mickel was in danger of great bodily harm. We conclude that the trial court did not abuse its discretion when it rejected Mickel's proposed instruction because the instruction was not supported by the evidence. Cf. Wilson v. State, 842 N.E.2d 443, 448 (Ind. Ct. App. 2006) (holding that the trial court erred in determining that the evidence did not warrant giving a proposed instruction addressing defendant's right to resist arrest where defendant would have been warranted in protecting his life by fleeing "the hail of bullets directed at his truck"), trans. denied.

The trial court also rejected this proposed jury instruction tendered by Mickel:

DEFENDANT'S TENDERED FINAL JURY INSTRUCTION NO. 2

> The law requires that resistance of law enforcement be forcible; the law does not allow a person to passively resist law enforcement.
>
> If you find that Jennifer Mickel only passively resisted law enforcement, then you must find her not guilty of resisting law enforcement.

Appellant's Appendix at 11 (footnote omitted). Mickel argues that, because Officer Pence described her initial resistance as passive, the trial court abused its discretion when it rejected this instruction.

We have rejected Mickel's argument that her resistance was merely passive. See Part I, supra. Thus, that portion of the proposed instruction was not supported by the evidence. Moreover, the trial court instructed the jury that, to convict Mickel, it had to be convinced beyond a reasonable doubt that she *forcibly* resisted, obstructed, or interfered with the officers while they were lawfully engaged in the execution of their duties. See Transcript at 280. To the extent that Mickel's proposed instruction tracks this language, it was adequately covered by the trial court's instructions. We therefore conclude that the trial court did not abuse its discretion when it rejected Mickel's proposed jury instruction.

For the foregoing reasons, we affirm Mickel's conviction for resisting law enforcement as a class A misdemeanor.

Affirmed.

ROBB, J. and CRONE, J. concur